Citation: Wu v. Aviva General Insurance Company, 2023 ONLAT 21-002851/AABS

Licence Appeal Tribunal File Number: 21-002851/AABS

In the matter of an application pursuant to subsection 280(2) of the *Insurance Act*, RSO 1990, c I.8, in relation to statutory accident benefits.

Between:

Bai Wen Wu

Applicant

and

Aviva General Insurance Company

Respondent

DECISION

VICE-CHAIR: **Brett Todd**

APPEARANCES:

For the Applicant: Yu Jiang, Paralegal

For the Respondent: Kathleen Mertes, Counsel

HEARD BY WAY OF WRITTEN SUBMISSIONS

OVERVIEW

[1] Bai Wen Wu (the "applicant") was involved in a motor vehicle accident on November 23, 2019 and sought benefits pursuant to the *Statutory Accident Benefits Schedule – Effective September 1, 2010 (including amendments effective June 1, 2016)* (the "*Schedule*"). Aviva General Insurance Company (the "respondent") denied certain benefits. The applicant submitted an application to the Licence Appeal Tribunal – Automobile Accident Benefits Service (the "Tribunal") for resolution of the dispute.

[2] The applicant submits that he is entitled to non-earner benefits ("NEB") as impairments suffered in the accident have caused him to suffer from a complete inability to carry on a normal life. He also submits that the respondent acted in contravention of the *Schedule* in its initial denial of his NEB claim. In addition, the applicant is seeking interest as well as a special award from the respondent due to its unreasonable withholding of this benefit.

[3] Aviva responds that the applicant has not demonstrated that he suffers from a complete inability to carry on a normal life and is therefore not entitled to an NEB. The respondent also submits that it followed the requirements of the *Schedule* in its denial of the NEB claim. As the insurer denies that any benefits are owing, the insurer also holds that no interest is applicable, nor a special award.

ISSUES IN DISPUTE

[4] The following issues are in dispute:

1. Is the applicant entitled to NEB in the amount of $185.00 per week from December 18, 2019 to November 23, 2021?

2. Is the respondent liable to pay an award under s. 10 of O. Reg. 664 because it unreasonably withheld or delayed payments to the applicant?

3. Is the applicant entitled to interest on any overdue payment of benefits pursuant to s. 51 of the *Schedule*?

PROCEDURAL ISSUE

What is the eligibility period of the NEB?

[5] I have changed the eligibility period for the NEB issue in dispute to December 18, 2019 to November 23, 2021, as the case conference report and order ("CCRO") dated September 24, 2021 lists the time period in question as being "December

22, 2019 to date and ongoing." This is not in accordance with s. 12(3)(c) of the *Schedule*, which states that an insurer is not required to pay NEB for more than 104 weeks after the accident.

[6] Submissions of the respondent clarify that December 18, 2019 to November 23, 2021 is the proper time period in dispute. Aviva submits a fax showing that the applicant sent his Application of Accident Benefits/OCF-1 and Election of Income Replacement, Non-Earner or Caregiver Benefit/OCF-10 on December 18, 2019, which completed the documentation required to begin the eligibility period for an NEB claim (a Disability Certificate/OCF-3 was submitted earlier).

[7] The above is not disputed by the applicant. Nor does the applicant make submissions that I should consider an NEB eligibility period outside of the 104 weeks mandated by the *Schedule*. Therefore, I accept the submissions of the respondent and adjust the dates of the NEB claim accordingly.

RESULT

[8] I find that:

i. The applicant is entitled to NEB for the period of time from December 18, 2019 to March 13, 2020, plus interest, as the respondent acted in contravention of s. 36(4)(b) of the *Schedule*.

ii. The applicant is not entitled to NEB for the period of time from March 14, 2020 to November 23, 2021, as he has not demonstrated a complete inability to carry on a normal life.

iii. The applicant is entitled to an award of 10 per cent of the NEB amount owing, plus interest, as the respondent acted unreasonably in its initial refusal to pay this benefit.

ANALYSIS

The Non-Earner Benefit ("NEB")

[9] Section 12(1) of the *Schedule* provides that an insurer shall pay NEB to an insured person who sustains an impairment as a result of the accident, if the insured person suffers a complete inability to carry on a normal life as a result of and within 104 weeks after the accident. Section 3(7)(a) defines a "complete inability to carry on a normal life" as "an impairment that continuously prevents the person from engaging in substantially all of the activities in which the person ordinarily engaged before the accident." The Court of Appeal set out the guiding

principles for the NEB entitlement test in *Heath v. Economical Mut. Ins. Co.*, 2009 ONCA 391, which generally requires a comparison of the applicant's pre- and post-accident activities.

[10] Here, I am dealing with two primary questions regarding the NEB issue in dispute. I address these in order below.

Is the applicant entitled to NEB for the period of time between December 18, 2019 and March 13, 2020 because the respondent did not act in accordance with the* Schedule*?

[11] I find that the applicant is entitled to NEB for December 18, 2019 to March 13, 2020, plus interest, as the respondent did not act in accordance with s. 36(4)(b) of the *Schedule*.

[12] Within 10 business days after an insurer receives a claim for NEB, an OCF-1, and an OCF-3, the insurer is required by s. 36(4)(a), (b), and (c) of the *Schedule* to:

a) pay the specified benefit;

b) give the applicant a notice explaining the medical and any other reasons why the insurer does not believe the applicant is entitled to the specified benefit and, if the insurer requires an examination under section 44 relating to the specified benefit, advising the applicant of the requirement for an examination; or

c) send a request to the applicant under subsection 33 (1) or (2).

[13] Section 36(6) details the consequences for an insurer that does not comply with s. 36(4)(b). It holds that an insurer "shall pay the specified benefit for the period starting on the day the insurer received the application and completed disability certificate and ending, if the insurer gives a notice described in subsection (4)(b), on the day the insurer gives the notice."

[14] Here, the applicant submits that the respondent did not follow s. 36(4)(b) of the *Schedule* and provide sufficient notice of the NEB denial. He argues that the explanation of benefits ("EOB") NEB denial letter sent to him by Aviva dated December 27, 2019 did not properly explain the "medical and any other reasons" as required. He further submits that this improper notification was not rectified until March 13, 2020, when Aviva sent an EOB to the applicant again denying the NEB claim, but this time citing as reasons the conclusions of s. 44 insurer's examination ("IE") assessments that were conducted in January and February

2020. Therefore, the applicant claims that s. 36(6) applies and he is entitled to NEB from December 18, 2019 to March 13, 2020.

[15] In response, Aviva focuses on the March 13, 2020 denial letter and the medical reasons therein. It argues that it has met all of its obligations for a valid denial notice, but in accordance with s. 37(6), which addresses the requirements placed on an insurer with regard to s. 44 examinations.

[16] That, to me, is not the issue here. The applicant accepts that the notice provided on March 13, 2020 was in accordance with the *Schedule*. And the respondent accepts that the applicant properly filed for NEB and had all of his required documentation filed with the insurer as of December 18, 2019. The dispute, as raised by the applicant, is with the initial notice provided on December 27, 2019, which he claims did not include medical or other reasons for the NEB denial.

[17] I agree with the position of the applicant. The Aviva EOB letter dated December 27, 2019 did not give an explanation for the denial of the NEB that, to me, would meet the requirements of s. 36(4)(b) of the *Schedule*. In this correspondence, Aviva noted that the OCF-3 completed by Dr. Georgia Palantzas, chiropractor, dated December 6, 2019 indicated that the applicant suffered from the complete inability to carry on a normal life as a result of the accident and was applying for NEB. However, the NEB claim was denied in this paragraph:

> Based on our review of you [sic] Disability Certificate (OCF-3), the medical practitioner who completed the form indicated that you did suffer a complete inability to carry on a normal life and as per you [sic] Election of Benefits (OCF-10) you have elected the Non-Earner Benefit. We're unable to determine whether the recommendations made on your Disability Certificate meet the disability requirement for the specified benefit you are claiming, and we're not able to pay your benefit at this time under Section 36(4)(b) of the Statutory Accident Benefits Schedule we require you to participate in an Insurer's Examination (IE). We won't be able to consider non-earner benefits from today until you participate in the examinations.

[18] This, to me, is insufficient notice. Although I am not bound by other Tribunal decisions, I concur with the opinion of former Executive Chair Lamoureux in *M.B. v. Aviva Insurance Canada*, 2017 CanLII 87160 (ON LAT). In this reconsideration decision, she held that an insurer's medical and any other reasons "should, at the very least, include specific details about the insured's condition forming the basis for the insurer's decision or, alternatively, identify information about the insured's condition that the insurer does not have but requires."

[19] No such specific details or a request for information can be found in the December 27, 2019 NEB denial letter. To me, it reads more like a generic form letter than sufficient notice that contains actual “medical and any other reasons” about the denial that is required by s. 36(4)(b) of the *Schedule*. Aviva provided virtually no information relating directly to the applicant’s claims and medical condition, leaving the applicant unable to make an informed decision about accepting or disputing the insurer’s denial—which in my view is a vital component of any such denial letter given both the wording in s. 36(4)(b) and the consumer protection goal inherent in the *Schedule*. Moreover, the explanation in the letter is confusing, with the key sentence denying the NEB running on and not making grammatical sense.

[20] For the reasons above, the applicant is entitled to NEB for the period of time between December 18, 2019 and March 13, 2020, plus interest in accordance with s. 51 of the *Schedule*.

Is the applicant entitled to NEB for the period of time between March 13, 2020 and November 23, 2021?

[21] I find that the applicant is not entitled to NEB for March 15, 2020 to November 23, 2021, as he has not provided sufficient medical evidence to demonstrate that he suffered from a complete inability to carry on a normal life as a direct result of and within 104 weeks after the accident.

[22] The applicant claims NEB entitlement based on medical evidence demonstrating that he suffers a complete inability to carry on a normal life as a result of physical and psychological injuries sustained in the accident. These injuries are listed on the December 6, 2019 OCF-3 of Dr. Palantzas and include dislocation, sprain, and strain of joints and ligaments at neck level and at thorax, lumbar spine and pelvis, and shoulder girdle; with injury of neck muscle and tendon; injury of thorax muscle and tendon; injury of shoulder and upper arm muscle and tendon; injury of spleen; headache; dizziness and giddiness; sleep disorders; malaise and fatigue; and disturbance of activity and attention. Dr. Palantzas notes on the OCF-3 that she anticipates the duration of the applicant’s disability to be more than 12 weeks.

[23] The applicant relies on medical evidence in the form of clinical notes and records (“CNRs”) from Dr. Heung Wing Li, family physician, records from Point Grey Physio; a psychological assessment dated April 2, 2020 completed by Bruce Cook, psychological associate, along with psychological progress reports also completed by Mr. Cook and dated September 30, 2020 and March 5, 2021; an occupational therapy in-home assessment report dated June 7, 2021 completed

by Raymond Wong, occupational therapist; and an Activities of Normal Life/OCF-12 form dated January 10, 2020.

[24] In response, Aviva submits an insurer examination ("IE") multidisciplinary assessment report dated March 3, 2020. All three reports included here—which detail the results of a physical assessment conducted by Dr. Richard Tse, physician, a psychological assessment by Fabio Salerno, psychologist, and an in-home occupational therapy assessment by Derek Adam, occupational therapist—conclude that the applicant does not suffer a complete inability to carry on a normal life.

[25] The applicant's evidence is not persuasive, at least in my opinion, for three primary reasons:

i. The applicant does not present consistent medical evidence demonstrating that he was unable to carry on his normal activities. His first and primary point of contact with medical assistance is Dr. Palantzas at Point Grey Physio, whom he saw more than two weeks after the accident for the purposes of completing the OCF-3 and beginning physiotherapy. The applicant attended Point Grey for 19 treatment sessions between December 6, 2019 and August 28, 2020. He did not see a family doctor until March 6, 2020 (over three months post-accident), when he visited Dr. Li at the Birchwood Walk-In Clinic. He had just two appointments with Dr. Li, this first visit and a follow-up on December 5, 2020.

   Dr. Li initially diagnosed the applicant with injuries consistent with those listed on the OCF-3, recommended that he continue physiotherapy and seek psychological treatment, and prescribed naproxen, baclofen, and Cymbalta for fixed periods (without repeats). Dr. Li confirmed these diagnoses and provided prescription refills during the second appointment. However, I question the thoroughness of this treatment, as Dr. Li saw the applicant just twice many months apart and he did not order any further investigation into the applicant's injuries in the form of diagnostic testing. The CNRs of Dr. Li also do not note any ongoing impairments relevant to the NEB claim. Finally, I assign little weight to the OCF-12, as it is just a catalogue of the applicant's self-reported complaints, with no medical support for these claims of impairment. In all, these medical records seem more indicative of soft-tissue injuries that were appropriately treated and resolved, not evidence of injuries resulting in a complete inability to carry on a normal life.

ii. The applicant's psychological assessment reports/progress reports and the in-home occupational therapy assessment reports are overly reliant on the self-reporting of the applicant with regard to his daily activities. Mr. Cook, for example, accepts the applicant's claims that he has been unable to do housework, work out, and play basketball due to the "physical and psychological aftermath" of the accident, and that the applicant has been unable to focus on school, resulting in a negative impact on his studies. No objective evidence has been submitted to support these statements, and according to a college transcript issued on December 23, 2020, the applicant's grades actually went up in the two semesters following the accident.

Also, even though Mr. Cook diagnoses the applicant as suffering from a "significant and severe depressive episode," the psychologist does not claim that psychological issues have resulted in the complete inability of the applicant to carry on his regular activities. Mr. Cook even notes that the applicant's anxieties are not troublesome enough to prevent him from continuing to drive, albeit more rarely than before. In the end, Mr. Cook recommends standard courses of psychological therapy to address these issues, which is confirmed in the two progress reports along with added documentation showing that the applicant has been showing improvement due to therapy. None of this information leads me to believe that the applicant is suffering from a complete inability to carry on a normal life.

I have similar concerns regarding the OT assessment conducted by Mr. Wong. In his report, Mr. Wong repeats many of the applicant's complaints about his pain and physical limitations involving household tasks. Mr. Wong does not record that he administered any formal tests to the applicant to determine his range of motion, or that he asked the applicant to perform specific household tasks so he could observe and assess the applicant's ability to perform them. Based on the report, all Mr. Wong did was ask the applicant to sit, stand, walk, bend/crouch/squat, and ascend/descend stairs, and then record what the applicant told him he could do and could not do due to claims of pain and dizziness. This assessment was also focused on completing an Assessment of Attendant Care Needs/Form 1, not the NEB matter. As a result, the report features no analysis of the applicant's daily activities. Overall, this report offers little support for the NEB claim.

iii. Finally, the applicant submits no formal comparison of his pre-accident and post-accident activities to meet the test as described in *Heath*.

> Although there are allusions to limitations scattered throughout the written submissions and the applicant's medical evidence, it is never presented in such a way that I can form a clear picture of how the accident affected the applicant's daily activities. Much of this is dependent on the self-reported claims of the applicant. There is little objective evidence to endorse such claims of impairment, through the CNRs of a treating physician, diagnostic imaging, or proof that the impairment impacted the applicant's studies. In the end, I am left mainly with the applicant's self-assessment of his activities before and after the accident, which I find to be of limited value on their own in demonstrating entitlement to NEB.

[26] To me, the respondent's medical evidence is more complete and compelling. The assessments collected in the multidisciplinary IE report all speak directly to the NEB question of whether the applicant suffered from a complete inability to carry on a normal life after the accident. Dr. Tse diagnoses the applicant with a mild impairment driven by a subjective level of pain that seems out of proportion with the severity of the accident, and concludes that the applicant can perform all of his regular activities post-accident.

[27] Mr. Salerno calls into question the applicant's subjective reporting when it comes to psychological symptoms, but diagnoses him with an adjustment disorder with depressed mood, mild. Regardless, Mr. Salerno finds that this issue does not affect the applicant's ability to carry on a normal life. Mr. Adam offers a similar conclusion in his occupational therapy assessment report and has concerns about "inconsistencies" in the applicant's efforts to perform light functional tasks around the home that, in his view, are not consistent with the injuries reported in the subject accident. Additionally, Mr. Adam finds that the applicant was able to transfer, stand, ambulate, negotiate stairs, bend, squat, crouch, and kneel. Although he does not specifically mention the applicant's ability to carry on a normal life, this is inferred in the report, at least by my estimation. Each of the above reports is definitive and consistent in its conclusions and assessments of the applicant.

[28] Consequently, I find that the applicant has not met his burden and demonstrated that he is suffering from a complete inability to carry on a normal life as a result of the accident. It follows that he is not entitled to NEB for the period of time between March 15, 2020 and November 23, 2021.

Is the applicant entitled to an award?

[29] I find that the respondent is liable to pay an award to the applicant of 10 per cent of the amount owing for the NEB between December 18, 2019 and March 13,

2020, plus interest, due to its unreasonable withholding of the NEB as a result of its non-compliance with s. 36(4)(b) of the *Schedule*.

[30] Pursuant so s. 10 of O. Reg 664, this Tribunal may issue an award of up to 50 per cent of the amount to which an applicant is entitled if it is found that a respondent has unreasonably withheld or delayed payment.

[31] I agree with the applicant that an award is appropriate in this situation, as Aviva should have been aware of its notice obligations under the *Schedule*.

[32] With that said, this is a relatively minor transgression that calls for a relatively minor monetary award. Aviva did properly adjust this file in all other ways, as far as I can tell from a review of the submissions in total. And the insurer was, in the end, correct in its determination that the applicant did not meet the NEB test.

[33] As a result, I am ordering that Aviva is liable to pay an award of 10 per cent of the NEB amount for December 18, 2019 to March 13, 2020, plus interest.

ORDER

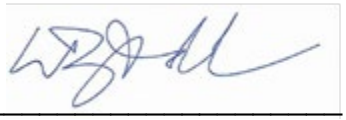
[34] I find that:

i. The applicant is entitled to NEB for the period of time from December 18, 2019 to March 13, 2020, plus interest, as the respondent acted in contravention of s. 36(4)(b) of the *Schedule*.

ii. The applicant is not entitled to NEB for the period of time from March 15, 2020 to November 23, 2021, as he has not demonstrated a complete inability to carry on a normal life.

iii. The applicant is entitled to an award of 10 per cent of the NEB amount owing, plus interest.

Released: June 6, 2023



Brett Todd
Vice-Chair